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NO. 128

In the Supreme Court of the United States

OCTOBER TERM, 1942

MIKE GURNEY, STEVE RUDEK AND JOHN M. DREW,
Appellants,

VERSUS

J. R. FERGUSON, H. L. CONLEY, GEORGE BRADLEY, ETC., ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR REHEARING OF STATEMENT AS TO JURISDICTION FOR WRIT OF APPEAL TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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APPELLANTS', PLAINTIFFS IN ERROR, PETITION FOR REHEARING

Come now Mike Gurney, Steve Rudek and John M. Drew, the above appellants, and petition this Honorable Court to set aside the order heretofore made and entered by it on the 12th day of September, 1942, dismissing the appeal heretofore sued out from the final order and decision of the Supreme Court of the State of Oklahoma against them and denying petition for writ of appeal and certiorari, and for cause thereof show:

That this action is one arising under Article 4 of the Constitution of the United States, which reads as follows:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several States," and under Article 6 of the Constitution of the

United States, that portion of the same reading as follows:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

The Legislative assembly of the State of Oklahoma, in the year 1939, passed the following Act, known now as Title 70, Section 1198 of the Oklahoma Statutes, 1941:

> "That whenever any school board shall, pursuant to this section or to any law of the State of Oklahoma, provide for transportation for pupils attending public schools, all children attending any private or parochial school under the compulsory school attendance laws of this state shall, where said private or parochial school is along or near the route designated by said board, be entitled equally to the same rights, benefits and privileges as to transportation that are so provided for by such district school board."

Previously, the Legislature had provided by proper and appropriate acts authority for all school districts in the state to contract for and operate free school buses for children attending school who were of compulsory school age under the laws of the State of Oklahoma. This Act included all white children and all colored children. The expense thereof was to be raised by taxation within the school district thus served which amount of taxes to be raised was to be based upon an actual school census of all children, within such school district, both white and colored, of compulsory school age.

Of course, this Act was made and entered by the Legislative Assembly pursuant to the police power of the State of Oklahoma, in order to protect school children in the country districts going to and from school, from weather conditions and all the hazards attendant upon their traveling along the public highways to and from school. The census of the school children within each particular district included all children of compulsory age, including those in attendance at public, private and parochial schools, the Legislature, in its benign care, pursuant to the exercise of its police power, having in mind the children attending private and parochial schools in addition to those attending the public or common schools, considering, doubtless, their lives and limbs and exposure to the inclemency of weather conditions, since they are all regarded as children of the state and would be entitled to equal protection along with all other school children included in the census or enumeration for which a tax levy was made to pay for the transportation of such children in school buses.

Pursuant thereto, the Appellee School District did cause a census to be taken within said school district, which included all the children attending the parochial school conducted by the Carmelite Sisters at Harrah, Oklahoma, located in the same town and near proximity to the common or public schools and contracted for this service with responsible carriers at the sum and price of $8400.00 for the scholastic year 1939 and 1940, and levied a tax upon all the taxable property within said school district, both that owned by children whose parents were sending them to parochial or private schools, and at least, theoretically, a

bus seat reservation, since they were included in the school census, was reserved for their accommodation in such school buses, for which the taxpayers paid.

This controversy arose when the three appellants, who are United States citizens, country farmers within the appellee school district, tendered their ten children to the drivers of the school buses on the day of the opening of the public schools, along convenient places on the highway where children attending the public or common schools were and had been under the theretofore existing Act, received for such transportation. The appellee school district, and its bus drivers apparently acting under directions of the school authorities, refused to receive, accept and transport the ten children of these appellants so tendered for transportation, and mandamus action was brought to compel their reception and transportation in free school buses, along with other children of compulsory school age attending the common or public school. This appeal, and the jurisdiction of this Court to entertain the same, is now invoked on this application for rehearing, grounded upon their rights under the constitution and laws of the United States of America to have equal protection along with all other children of compulsory school age of other parents attending the common or public schools, in accordance with the Legislative enactment made by the General Assembly in 1939.

Nothing is asked in this action, and particularly in this petition for rehearing, except the service to which these children attending a parochial school should have in common with all children attending the public schools.

So said the wise Legislature of the State of Oklahoma, and the Act is in all respects a proper exercise of the police power of the state, exercised through the legislative assembly and a service for which taxpayers of the appellee school district have been assessed and paid taxes on all property taxable under the laws of Oklahoma located within the territorial district comprising said appellee school district.

The denial of this right that these children own and possess and their parents for them, at their election to send their children to a parochial school, abridges and circumvents their constitutional rights secured to them as citizens of this Democracy and expressly provided for by the constitutional enactments of the United States, as aforesaid.

While this action is pitched upon the right of these appellants as citizens of this nation, particularly upon Articles 4 and 6 of the Constitution of the United States, other sections of the Constitution, to-wit, Amendment I of the Constitution of the United States, being the religious liberty section sometimes known as the Thomas Jefferson Amendment, and Amendments 5 and 14, are matters for serious consideration in connection with the rights of the appellants herein contended.

Litigation has spread throughout the nation in the courts of the various states arising under the various provisions of the Constitution of the United States, treaties made pursuant thereto involving the personal liberty of citizens of the different states, secured to them under these various national constitutional provisions and amendments.

This litigation has taken the form, for the most part, in the so-called free text book cases and latterly the free school bus cases. Prior to the arising of this character of litigation, an action was brought in the courts of Oklahoma to compel, through a mandamus proceeding, inter and intrastate commerce of wine used for sacrifice of the Holy Mass by the priesthood of the Catholic Church and other religious bodies, notwithstanding the Bone Dry law of the State of Oklahoma. A case decided by our own Oklahoma Supreme Court is that of *DeHasque* v. *Atchison, Topeka and Santa Fe*, 68 Okla. 183, 173 Pac. 73. The lower court in that case had held against the church in the mandamus proceeding. The decision of the lower court was reversed and the Supreme Court of Oklahoma decided that the use of wine which was intoxicating in no manner was in violation of the Bone Dry law of the State of Oklahoma, and read into the Bone Dry statute the exception, thereby permitting the transportation of wine for sacramental purposes, stating in the review by the Court that the practice of sacrifice of the Holy Mass had been indulged in within the territorial confines of the State of Oklahoma since the Sixteenth century. Since that decision, Catholics and all other religious bodies requiring wine have freely had access to the same through both interstate and intrastate transportation.

Still another case by the Supreme Court of Oklahoma, that of *Oklahoma Railway Co.* v. *St. Josephs Parochial School*, 33 Okla. 755, 127 Pac. 1087, it is held that street car tickets required by the transportation company to be furnished to children attending public schools of

the city at reduced fares required such transportation company to receive and accept like fares from school children attending St. Josephs Parochial School, and that the term "public schools of said city" included all public schools of said city whether maintained by the public by taxation or by private agencies for the public by private benevolences.

There has been, therefore, an apparent effort on the part of our courts to deal with religious rights with liberality. In keeping with these two cases, it was confidently expected that our courts would continue to adhere to such a liberal doctrine of construction. Therefore, the decision of the Oklahoma Supreme Court in the instant case, which is quoted in full in Appendix B in the present contest, constitutes, to some extent, a departure from this previous principle or doctrine by our courts. It is based solely upon the constitutional provision obtaining in Oklahoma, being Section 5 of Article 2, and Section 5 of Article 11, quoted in full at page 7 of the appellants' brief supporting its statement as to jurisdiction.

The appellants find no fault with these provisions of our state constitution. They are regulatory of the purposes for which school funds may be adopted and used. These funds arise from the proceeds of sale and disposition of Sections 16 and 32 administered by the School Land Department of the State of Oklahoma, in every township in the old Oklahoma Territory, now being administered along with five million dollars appropriated by the National Congress for the use and benefit of the schools of the state to equalize the funds raised from the

sale and disposition of these school lands in old Oklahoma Territory when joint statehood was declared for the two territories, to-wit, Oklahoma and Indian Territories. It is appellants' theory that these two constitutional provisions can remain intact and that they contain no inhibition against the enactment of the 1939 Legislative Assembly providing for the transportation in free buses of school children attending private and parochial schools. Appellants' position in this respect is well illustrated and defined by the decision of the Supreme Court of the United States in *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 379. In that case former Chief Justice Hughes wrote the opinion, quoting from the Supreme Court of the State of Louisiana, and adopting the philosophy of said decision as the final decision of the Supreme Court of the United States, and said as follows; paraphrasing the language used by the Louisiana Court with the following preliminary observation:

> "The purpose is said to be to aid private, religious, sectarian and other schools not embraced in the public educational system of the state by furnishing textbooks free to the children attending such private schools. The operation and effect of the legislation in question were described by the supreme court of state as follows (168 La., p. 1020, 67 A. L. R. 1183, 123 So. 655):
>
> " 'One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free

of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries * * *.'"

Contrast this theory with the decision rendered by Chief Justice Welch in the Supreme Court of Oklahoma in the instant case, wherein it is stated:

"It is urged that the present legislative act does not result in the use of public funds for the benefit or support of this sectarian institution or school 'as such'; that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. A similar argument was said to be 'utterly without substance' in *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576."

The previous statement of Justice Welch, that the argument advanced by appellants was not impressive, was made by him with full knowledge of the decision of Chief Justice Hughes, foregoing, and with full knowledge that free textbooks were being furnished to children attending parochial and private schools, which textbooks were purchased by the State of Oklahoma from public funds appropriated by the legislature for that purpose, and this pursuant to no legislative enactment, but because of the

opinion of the Attorney General of the State of Oklahoma after the rendition of the opinion by the Supreme Court of the United States in the Louisiana textbook case, which opinion forms Appendix A to the appellants' original statement to this Honorable Court seeking to have this Court take jurisdiction of the controversy.

This Honorable Court took jurisdiction, and granted the writ, in the Cochran case. The application therefor was made by the taxpayers of the State of Louisiana, who sued out the writ of appeal in that case.

Here, the appellants invoke the jurisdiction of this, the highest court in our land, to protect their humble constitutional rights as citizens of this nation. If this Honorable Court took jurisdiction in the Cochran case it should now take jurisdiction in this case.

Chief Justice Welch referred to the Judd case in New York, which was a bus transportation case, wherein transportation of parochial and private school children was refused and the action in so doing was upheld by the Court of Appeals of the State of New York. In that state the patrons of private and parochial schools, as a matter of history, have been strong enough to vote a constitutional amendment at the polls of that state, and New York children attending private and parochial schools are now riding the free buses.

In the construction placed on the free textbook case by the State Supreme Court of Louisiana, and adopted by the Supreme Court of the United States in the Cochran case, it is specifically held that no church or sectarian

institution received any benefit by reason of furnishing the children attending such schools free textbooks. Here, the Supreme Court of Oklahoma rejects this reasoning, with the statement, "That argument is not impressive."

While there are other patrons, consisting of various religious denominations and parents of children preferring private and parochial schools to public schools, nevertheless, the vast majority of parents preferring such character of schools are members of the Catholic faith. The right of a Catholic parent to send his children to a school conducted by the members of his faith and for their use and benefit and for religious purposes has been sustained by the Supreme Court of the United States in *Pierce* v. *Society of Sisters of Holy Name*, 268 U. S. 510, in an opinion by former Justice McReynolds. This is commonly known as the Oregon School Case, wherein it was sought by legislative enactment of the State of Oregon to compel all children of compulsory school age to attend a public school. This principle of law as to the transcendent right of a parent to direct his children of compulsory school age to attend a Catholic or parochial school subordinates the right of the state under the doctrine of *parens patriae*, and this transcendent right of a parent permeates the legal lore of the nation and has been universally sustained by the courts since the decision of Mr. Justice McReynolds in the Oregon School Cases.

While we do not in this application and petition desire to raise any issue of prejudice against Catholicism, nevertheless, an inquiry into physical conditions may reflect some reason for our Supreme Court, that of Okla-

homa, to make the observation made by its Chief Justice in the opinion in the instant case, "That argument is not impressive". According to the 1940 census of the United States, the Catholic population of the State of Oklahoma is given at page 857 of the World Almanac for the year 1941, as 64,700; compared with the total population of the State of Oklahoma, shown at page 503, same authority, as 2,334,237, this is an approximate Catholic population of 2½ per cent of the total population of the state.

While there are other religious bodies and patrons of both religious and private schools than Catholics in the State of Oklahoma, such as Seven Day Adventists, Lutherans, Episcopalians and persons of Jewish faith, maintaining and patronizing religious and private schools, their numerical strength is not available, but is bound to be much smaller than even the Catholic population of the state.

Now, in the State of New York, where the Judd case was decided, and a constitutional amendment was enacted by popular vote, the same authority, to-wit, World Almanac 1941, gives the total Catholic population of the dioceses of New York City, Brooklyn, Albany, Buffalo, Ogdensburg, Rochester and Syracuse, as a total of 3,111,763, while the state's total population is given as 13,379,622, the Catholic population being approximately 24 per cent of the total population of the state. Other believers in and patrons of private and religious schools, than Catholics, are likewise doubtless more numerically and in ratio than in Oklahoma, but the figures are not available. This is the state that voted the constitutional amendment,

notwithstanding the appellate court's decision, providing for the transportation of parochial and private school children on free school buses.

Now, the State of Louisiana, wherein the Cochran case was decided by the Supreme Court of that state, has in its three dioceses, to-wit, New Orleans, Alexandria and LaFayette, a Catholic population of 811,287, while the State of Louisiana's total population is 2,360,661. The Catholic population of the State of Louisiana is, therefore, approximately 34 per cent.

Human nature is human nature. Men, even jurists, cannot help being influenced by their environment and daily communion with their fellow men. Doubtless, the population of Catholic faith have inspired the judicial minds of the State of Louisiana, and the Catholic vote has influenced the political situation in the State of New York, just the same as the Protestant inclination has manifestly and unwittingly had its influence in the decision of our Supreme Court in the instant case, for all the judges concurred, except Justice Gibson, in the determination that this legislative enactment of the year 1939 was unconstitutional under the flimsy pretext, as expressed by Chief Justice Welch that "That argument is not impressive," referring to the use of public funds being for the benefit of the child and not for the benefit of the sectarian institution conducting the school.

In the foregoing comparison, based on actual population figures, we referred to the Protestant influence as dominant in Oklahoma. That may be more or less of an

erroneous statement. We mean to say that the influence, instead of being Protestant, which has opposed the petitioners in this litigation, arises out of distinctly anti-Catholic sentiment, of which the Ku Klux Klan are the chief exponents. In all candor, these appellants now beseech this Honorable Court to take jurisdiction of this case.

The principle here involved is fundamental, that is, their rights as citizens of this great Democracy. The original demonstration of the limits to which an independent American citizen will go to protect his rights has been lastingly illustrated before this nation was born and conceived, as evidenced by the Boston Tea Party, taking place in the Harbor of Boston, Massachusetts, wherein the principle of taxation without representation has been vividly exemplified. Citizens of this Democracy will have their constitutional rights, and with all due respect to this Honorable Court in its previous decision rejecting the case for want of jurisdiction, we now make this renewed appeal to the Court for the relief to which we sincerely believe we are entitled. Sooner or later, this Court will doubtless have further applications made to it for relief of citizens of the nation and the protection of their fundamental right to exercise their power of selection in this question of schools.

The State of Wisconsin, in the case of *Van Stratton* v. *Milquet School Treasurer*, 180 Wis. 109, 192 N. W. 392, has held that free school buses were not available to children attending private and parochial schools. It is reported in the Public Press that the Superior Court of Thurston County, State of Washington, has adhered to the

same ruling. In the State of Washington case the Attorney General had rendered an opinion that parochial and private school children were entitled to bus privileges independent of any legislative enactment by that state. In Wisconsin we are not aware of the condition of the legislative enactment, if any.

The Attorney General of Oklahoma, had he followed his opinion following the decision of the Supreme Court of the United States in the Cochran case that had to do, of course, with free textbooks, would have, doubtless, as a matter of construction, held that bus privileges were available to children attending private and parochial schools, and, had he been consistent, would have undoubtedly, after the legislative enactment in question of the 1939 Assembly so held.

The State of Mississippi, in a very recent decision, that of *Chance* v. *Mississippi State Book R. & P. Board,* 200 So. 706 (State Reporter not yet available), followed Chief Justice Hughes' opinion, in direct conflict with the Oklahoma decision in the instant case.

The Constitution of the State of Mississippi, 1890, Section 208, provides as follows:

> "Section 208—It shall be the duty of the legislature to encourage by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement by establishing a uniform system of free public schools by taxation or otherwise for all children between the ages of five and twenty-one years, and as soon as practicable to establish schools of higher grade. No religious or other sect or sects shall control any part of the school or other educa-

tional funds of this state; nor shall any funds be appropriated toward the support of any sectarial school, or to any school that at the time of receiving such appropriation is not conducted as a free school."

Chapter 202—Laws of 1940—is an act to establish a State Textbook Rating and Purchasing Board, with the power to select, purchase and distribute free textbooks by loaning same to pupils through the first eight grades in all qualified Elementary Schools of the State.

Section 23 of Chapter 207 provides, "This act is intended to furnish a plan for re-adoption, purchase and distribution, care and use, of free textbooks to be loaned to the pupils in the elementary schools of Mississippi."

The court states:

"The privilege of requisition by qualified private and sectarial schools for the loan of books to its pupils does not place in such schools the 'control' (of) any part of the school or other educational funds of the state. The mere availing of benefit of an appropriation carefully made does not result in a 'control' of such funds * * *. Nor is the loaning of such books under the circumstances to the individual pupils a direct or indirect aid to the respective schools which they attend, although school attendance is compulsory. Such pupil is free to attend a proper public, or private school, sectarian or otherwise * * *. This conclusion that the act must be regarded as one within the function of enforcing attendance at school, renders it unnecessary to consider separately the objection that religious institution is aided."

There will be found among the citizenry of the nation

no stauncher supporters than members of the Catholic faith, of the theory of American freedom, religious liberty and the sacredness of American institutions. Catholics, in their full quota, and doubtless far in excess of their full quota, have furnished the armed forces of the United States with their full complement of membership. Their belief, religiously inspired, is that of absolute separation of church and state in the American Republic, each co-equal in their own spheres, the church in ecclesiastical matters, the nation in governmental matters, ever willing to fight, and die, if necessary, for the preservation of the nation in all its glory and liberties.

We respectfully submit that inasmuch as this Honorable Court can now see from the facts herein stated that sooner or later this Court is bound to exercise its jurisdiction in the permanent settlement of this litigious question as to the rights of the citizens of the nation in their own sphere and beliefs as to schools their children of compulsory school age shall attend, where they shall be educated and how educated.

We respectfully petition this Honorable Court to now take jurisdiction of this cause and determine a controversy in its early stages before further developments occur, and not leave the serious question of this fundamental right to the tender mercies of the different states, and that, following the existing rule as evidenced by the Cochran Louisiana Textbook Case, on final consideration by this Honorable Court of said cause, the question be resolved in favor of these appellants, in full vindication of their rights, and the reversal of the decision of the Supreme Court of

Oklahoma in the instant case. Such prompt action will prevent a multiplicity of suits and unify and make one the inherent and inalienable right of every citizen of this Republic in the exercise of his option, which he now knows he has, but which lacks the safeguard of a court of final jurisdiction by reason of its decision fully vindicating such right to choose, as our Honorable Supreme Court of this nation has said, the school or influence in which his children of compulsory school age may be educated, they to be afforded all the rights of other children, all being children of the state, and that they be held to be entitled to the privileges of school bus accommodations, pursuant to the legislative enactment of Oklahoma, paid for by their parents through taxation, and the vacant seats in such school buses provided for them by reason of the census taken of the school population of said rural school district, be filled with their presence and they be thereby protected from the hazards of the highway in common with all other children of the state.

Respectfully submitted,

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Counsel for Appellants.

LOONEY, WATTS, FENTON & EBERLE,
Of Counsel.

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CERTIFICATE OF COUNSEL

State of Oklahoma,

ss:

Oklahoma County,

I, W. F. Wilson, of counsel for the appellants in the above entitled cause, do hereby certify that the within and foregoing Petition for Re-Hearing of the appellants for Writ of Appeal to the Supreme Court of the State of Oklahoma is not presented for delay, but in good faith for the purpose of presenting legal questions to the Court and alleged errors and misunderstandings, and for the further purpose of calling to the attention of this Court the fundamental legal question herein involved, that of taxation of property owners upon their property without, according to such taxpayers, the enjoyment of the benefits derived through the means of such taxation.

Dated at Oklahoma City, Oklahoma, this.....day of October, 1942.

.....

W. F. WILSON,

Counsel for Appellants.